United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

77-1143

To be argued by
ANGELO T. COMETA

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

HOWARD E. SAFT,

Defendant-Appellant.

Docket No. 77-1143

APPENDIX TO APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
FILED
APR 25 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PHILLIPS, NIZER, BENJAMIN
KRIM & BALLON
Attorneys for Defendant-
Appellant
40 West 57th Street
New York, New York 10019
(212) 977-9700

Of Counsel:

Angelo T. Cometa
Sheila Ginsberg
David Richenthal
Jonathon Warner

PAGINATION AS IN ORIGINAL COPY

A

CRIMINAL DOCKET - U.S. District Court

JUDGE XXXXXX Assigned | 0851 | Disp: Sentence

U.S. vs SAFT, HOWARD E. (LAST, FIRST, MIDDLE)

Case Filed Mo. 04 Day 21 Yr. 76 | Docket No. 0414 | Def. 01

JUVENILE | No. Defts 03

U.S. MAG. CASE NO.

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:371	Consp. to commit mail fraud.	1
18:1014	False financial statements to banks.	2-8
18:1341	Mail fraud.	9-21
26:7201	Income tax evasion.	22

SUPERSEDING COUNTS

BAIL • RELEASE

Denied | AMT Set | Fugitive | Pers. Recog. | PSA

$ 000 conditions

Date

10% Deposit | Surety Bond | Collateral

Bail Not Made | Status Changed (See Docket) | 3rd Pty Cust | Other

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT X	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began 4-21-76	High Risk Date / Information 4-21-76		Trial Set For 10-14-76	Disposition of Charges 09-28-76
Summons Served	Indict. Waived	1st Plea 4-29-76 X NG G NOL	Voir Dire	Convicted / Acquitted / Dismissed: WOP WP — On All Charges / On Lesser Offense(s)
First Appearance	In Charging District / Superseding Indict/Info	G. Plea W/Drawn	Trial Began	On Government's Motion
		Final Plea 09-28-76 NG X G NOL	Trial Ended	

MAGISTRATE

	DATE	INITIAL/NO.		INITIAL/NO.	OUTCOME
Search Warrant: Issued / Return			INITIAL APPEARANCE DATE ▶		DISMISSED
Summons: Issued / Served			PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled ▶ / Date Held ▶		HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Arrest Warrant Issued			WAIVED / NOT WAIVED	Tape Number	HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
OFFENSE (In Complaint)			INTERVENING INDICTMENT		

U.S. Attorney or Asst.

Steven A. Schatten
791-9154

ATTORNEYS Defense / CJA / X Ret. / Waiver / Self / None / Other / CD / CD

Phillips Nizer Benjamin Krim & Ballon
40 W.57th St.,NYC 10019
Tel. 977 9700

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* Show last names and suffix numbers of other defendants on same indictment/information

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
4-21-76	Filed indictment.	
4-29-76	Deft. (Atty. present) enters plea of N/G. Bail $50,000 secured by $5,000 cash (to be posted by 4 PM today). Surrender passport and a written intinerary of his trips and where he will be at all times. Deft. ordered f/p. Case assigned to Judge Pierce for all purposes. Atty. directed to report to Chambers immediately. MacMahon,J.	
5-4-76	Filed Order that counsel for dft. is directed to confer with the Gov't within One week as indicated & dfts.shall have One Add'l week to file motions as indicated. Gov't shall respond within 10 days thereafter,pretrial conference set down for 5/5/76 in courtroom 706.....Pierce J. (mailed notice)	
5-3-76	Filed PRB in the Amt. of $50,000.00/in cash & $500.00 secured by 12 noon 4-30-76 to be deposited. Bond amended to read the posting of cash or surety pur. to stip. dted 5/3/76. Receipt of Passport is hereby acknowledged 4-29-76 Steven A. SchattenAUSA.	
4-29-76	Bail Application hearing held as to dft. Saft- Motion of dft. denied...Pierce J.	

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW IN SECTION V ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

DATE	DOCUMENT NO. — IV PROCEEDINGS (continued) — PAGE TWO	V EXCLUDABLE DELAY
5-3-76	Filed PSB in the Amt. of $5,000.00 Secured by The Stuyvesant Ins. Co.	
5-6-76	Filed Notice of Appearance - Louis Bender, 225 Bway, NYC 10007 Tel. 227 6000.	
5-11-76	Pre Trial Conference held - all dfts. & their attys present Trial begins October 4, 1976 @ 9:30 a.m. Present bail cont'd as to all dfts.....Pierce J.	
5-10-76	Filed Stip & Order that the appearance bond is amended & deemed to state there is to be deposited or filed in the registry of the court the sum of $5,000.00 in cash or a surety bond in the sum of $5,000.00 by 4:00 p.m. on 5/3/76. .....Pierce J.	
6-1-76	Filed Dfts. Affdvt. in support of application to obtain financially services, as indicated.	
6-15-76	Filed Memorandum of Law in support of Dft. Howard Saft.	
6-15-76	Filed Dfts. Notice of Motion for an order dismissing Indictment for a separate trial from other dfts.	
7-22-76	Filed Gov'ts Responses to Dfts. Motions for Bill of Particulars & other relief & responses to request for inspection & discovery.	
7-22-76	Filed Affdvt. in Oppositions to dfts. motions for discovery & inspection, Bills of Particulars & other relief.	
7-22-76	Filed Gov'ts Memorandum of law in opposition of Dfts. motions for Bills of Particulars, for other relief.	
07-8-76	Filed Govt's notice of readiness for trial on or after 10-5-76.	
08-10-76	Filed Dfts. Affidvt. by David L. Fox in support of application to join dft. N. Fialkow's motion directing testimony of Leo Chaikin, etc.	
8-23-76	Filed Affdvt. by David L. Fox in support of dfts. motion for authorization to incur not less than $1,000 in add'l expret acctg. services.	
8-25-76	Filed Dfts. Affdvt. in support of motion for authorization to incur not less than $1,000 in add'l expert acctg. services.	
8-25-76	Filed Mo. End. on Dfts. motion dtd. 8/23/76. Counsel is directe , submit an appropriate form of order authorizing such services under the Criminal Justice Act. Motion Granted. .....Pierce J. (m/n)	
9-1-76	Filed CJA 20 copy 5 - appointing M.A. Libien, C.P.A., 36 West 44th Street, NYC 10036 as an accountant to complete discovery in this case for dft. ....Pierce J.	

(Cont'd)

RECEIPT NUMBER	C.D. NUMBER	RECEIPT NUMBER	C.D. NUMBER

(Cont'd)

76 Criminal 414 SAFT, HOWARD E. Dft. 0

D. C. 110 Rev. Civil Docket Continuation Judge Pierce

DATE	PROCEEDINGS	Date C Judgme
9-1-76	Filed CJA 20 Copy 2 - approving payment to M.A.Libien C.P.A., 36 West 44th St., NYC 10036 as an accountant to complete discovery in this case for dft. Pierce J.	
9-15-76	Filed Gov'ts Bill of Particulars & Add'l Discovery Responses for DftHoward Saft.	
9-17-76	Filed Order Motions of the dft, for a bill & for discovery are granted to the extent consented to by the Gov't & in all other respects denied.....Pierce J. (Pro Se mailed notice)	
09-20-76	Filed Opinion #45118. Dfts. motions to dismiss Indictment,severance & for an inspection of the Grand Jury Testimony of his co-dfts. & order directing Gov't to elect between Count's One & Twenty Two is Denied.....Pierce J.(mn)	
9-22-76	Filed Gov/ts. Proposed examination of prospective jurors.	
9-28-76	Dft. Saft & his aty. David L. Fox Present) withdraws his plea not guilty as charged & pleads guilty on each of counts 3,6 & 22 only. P.S.I. Ordered. Sentence Nov. 9,1976 @ 4:30.....Pieree J.	
10-14-76	Filed transcript of record of proceedings. dated 9-28-76	
11-4-76	Filed Memo. End. on letter from Phillips Nizer,et al. dtd. 11-3-76 Re: Trial & Charges. Adj. to 11-9-76 of sentence is granted. No Opposition. Application to vacate the plea on or before 11-23-76 is Granted. Gov't to reply in 10 Days. All Counsel to Appear in this Court on 11-9-76 at 4:45 p.m in courtroom 1305 for dfts. application to be represented ~~by~~ by new counsel.....Pierce J.(mn)	
11-24-76	Filed Memorandum of Law in support of Howard E. Saft's Motion withdraw his Guilty Plea.	
11-24-76	Filed Dfts. Notice of Motion & supporting affdvt. for order to withdraw his Guilty Plea. Ret. 12-8-76.	
12-1-76	Filed Consent Order to change Atty. that Phillips Nizer Benjamin Krim & Ballon be substituted as attys for dft. in place & stead of David L.Fox.....Pierce J.	
12-13-76	Filed transcript of record of proceedings, dated 4-29-76	
12-13-76	Filed transcript of record of proceedings, dated 4-29-76	
12-16-76	Filed Dfts. Reply Memorandum of law in support of Dft.s motion to withdraw his Guilty Plea.	
12-16-76	Filed Dfts. Reply Affdvt in support of motion to withdraw his plea of Guilty.	
1-7-77	Filed Govt.Affdvt. in opposition to dft. Saft. motion to vacate his plea of guilty to counts 3,6,& 22.	
1-25-77	Filed Order that dft. shall file supplemental papers insupport of his motion to vacate no later than 1/31/77 & the Govt. shall file papers in opposition by 2/7/77.....Pieree J. (mn)	
1-31-77	Filed Supplemental Memorandum of law insupport of Howard E.Saft motion to withdraw his guilty plea. (Cont'd)	

76 Cr. 414 Howard Saft

Judge Pierce Pg. #4

DATE	PROCEEDINGS	Date of Judgment
2-14-77	Filed Govts. Memorandum of law in opposition to Saft's Supplemental Motion & Memorandum based on U.S. vs. Journet, 544 F.2d 633(2d Cor.1976)	
2-13-77	Filed Memo. End. on motion dtd.11-24-76.Motion to vacate plea of guilty is denied. Sentence set for 3/3/77 @ 4:00 P.M..... Pierce J.(mailed notice)	
2-23-77	Filed Supplemental Reply Memorandum of law in support of Dfts. motion to withdraw his Guilty Plea.	
2-23-77	Filed Govts. Memorandum of Law in opposition to Dfts. motion to withdraw his Guilty Plea.	
2-24-77	Filed Dfts. Notice of Motion & Supporting affdvt.for order reducing sentence imposed upon.	
2-28-77	Filed Dfts. Notice of Appeal from orders dtd. 2-17-77. (mailed notice)	
3/4/77	Filed Dfts. Notice of Appeal from Judgment entered 3/4/77.(mailed notice)	
3/4/77	Filed Court Exhibit #1 - Govt. Sentencing Memorandum.	
3/4/77	Filed Court's Exhibit #2 - Memorandum from U.S.Atty. Robert B.Fiske,Jr. to Judge Pierce dtd. 3/1/77.attached Govt. recommendations with respect to sentencing.	
3/4/77	Filed Court's Exhibit #4 - Letterss of Reputation & Character.	
3/4/77	Filed Court's Exhibit #3 = letter to Judge Pierce from Phillips Nizer Benjamin Krim & Ballon by ANGELO T. COMETA dtd. 3/2/77. Re: Sentencing (8 Pages Long)	
3/4/77	Filed Court's Exhibit #5 = letter to Judge Pierce from U.S.Atty. SDNY dtd. 3/3/77. Re: responding to defense counsel 3/2/77 letter.	
3/3/77	Filed Judgment & Commitment (Atty. Angelo Cometa Present) The Dft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of TWO (2) YEARS on each of counts 3 and 6 to run concurrently with each other. ONE (1) YEAR on count 22 to run CONSECUTIVELY to the suntence imposed on counts 3 and 6. Execution of sentence is stayed pending appeal.Present Bail $50,000 PRB sec. by 10% cash is continued pending appeal. Counts 1,2,4,5 & 7 thru 21 remain open pending appeal.....Pierce J. Issued Commitment..3/8/77	
3/11/77	Filed Dfts. Notice of Motion to proceed on appeal in forma pauperis.Ret. 3/18/77.	
3/23/77	Filed transcript of record of proceedings, dated 2-3-77	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v- : INDICTMENT

HOWARD E. SAFT, : 76 Cr. 414
NORMAN FIALKOW, and
EDWARD WEIZER, :

Defendants. :

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COUNT ONE

The Grand Jury charges:

INTRODUCTION

1. At all times relevant to this Indictment, ADLAY JEWELRY, INC. (hereinafter "ADLAY") was a corporation organized under the laws of the State of New York and located in New York. The principal business of ADLAY, which was conducted by the corporation and various subsidiaries, involved the purchasing and selling at retail of watches, precious jewelry, such as diamond rings, etc., and costume jewelry. Most of the retail outlets of ADLAY and its subsidiaries were located in department store chains, such as S. KLEIN DEPARTMENT STORES INC., ROBERT HALL VILLAGE and CLARKINS. At all times relevant hereto, CHAREEN WHOLESALE JEWELERS, INC. ("CHAREEN") was a wholly owned subsidiary of ADLAY.

2. On or about June 6, 1974, ADLAY and its consolidated subsidiaries filed petitions in proceedings under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of New York. As of June 6, 1974, ADLAY and its consolidated subsidiaries had liabilities in excess of seven million dollars, including the amounts owed to various banks and to trade creditors. As of June 6, 1974, ADLAY and its consolidated subsidiaries had assets of approximately four million dollars.

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3. At all times relevant to this Indictment, HOWARD E. SAFT ("SAFT"), the defendant, owned 75% of the shares of common stock of ADLAY. At all times relevant to this Indictment, SAFT was the President and Chief Executive Officer of ADLAY.

4. At all times relevant to this Indictment prior to on or about June 1, 1974, the accounting firm of CHAIKIN & FIALKOW, named herein as a co-conspirator but not as a defendant, prepared certified financial statements, and performed other accounting services, for ADLAY, and were located at 55 West 42nd Street, New York, New York; NORMAN FIALKOW ("FIALKOW"), the defendant, was a member of CHAIKIN & FIALKOW and performed accounting services for ADLAY and its subsidiaries and Leon M. Chaikin ("Chaikin"), named herein as a co-conspirator but not as a defendant, was a member of CHAIKIN & FIALKOW and performed accounting services for ADLAY and its subsidiaries.

5. At all times relevant to this Indictment prior to on or about June 1, 1974, EDWARD WEIZER ("WEIZER"), the defendant, was employed as an accountant at CHAIKIN & FIALKOW, and performed accounting services for ADLAY and its subsidiaries.

6. At all times relevant to this Indictment, the BANK LEUMI TRUST COMPANY OF NEW YORK ("BANK LEUMI") was a bank located in New York, New York, and was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation.

7. At all times relevant to this Indictment, the EMPIRE NATIONAL BANK ("EMPIRE BANK") was located in New City, New York and in Newburgh, New York, and was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation.

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8. At all times relevant to this Indictment, the NATIONAL BANK OF NORTH AMERICA ("NBNA") was located in New York, New York and was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation.

9. At all times relevant to this Indictment, the AMERICAN BANK & TRUST COMPANY ("AMERICAN BANK") was located in New York, New York and was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation.

I. THE CONSPIRACY

10. From on or about the 1st day of April, 1971 up to and including the date of the filing of this Indictment, SAFT, FIALKOW and WEIZER, the defendants, unlawfully, wilfully and knowingly, did combine, conspire, confederate and agree together, and with co-conspirators CHAIKIN & FIALKOW, Leon M. Chaikin, ADLAY and CHAREEN and with others both known and unknown to the Grand Jury, to commit violations of Federal Laws, to wit, violations of Title 18, United States Code, Sections 1014 and 1341.

II. THE OBJECTS OF THE CONSPIRACY

11. The objects of the conspiracy were (i) to prepare and distribute and to allow and to cause the preparation and distribution of financial statements of ADLAY and its subsidiaries which were false and misleading; (ii) to conceal the true state of affairs at ADLAY and its subsidiaries, including the amounts actually owed creditors, and the fact that SAFT was secretly taking out of ADLAY and its subsidiaries hundreds of thousands of dollars for his own use and for his own purposes; (iii) to submit false and misleading financial statements for ADLAY and its subsidiaries and other false and misleading information to various banks, other lending institutions and creditors; and (iv) to thereby fraudulently cause the unsuspecting banks, other lending institutions and creditors to loan or otherwise advance over $5 million to ADLAY and its subsidiaries.

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III. THE MEANS BY WHICH THE CONSPIRACY WAS CARRIED OUT

12. Among the means by which the defendants and their co-conspirators would and did carry out the said conspiracy were the following:

(a) On or about February 3, 1972, the defendants and their co-conspirators prepared and issued a financial statement for ADLAY and its subsidiaries for the calendar year 1971 which falsely stated that physical inventories at various locations were taken twice yearly under the direct supervision of accountants employed by co-conspirator CHAIKIN & FIALKOW and that the inventories as shown represent the true valuation as of December 31, 1971, whereas, as the defendants then and there well knew, accountants of CHAIKIN & FIALKOW at no time in 1971 ever had occasion to supervise the taking of physical inventory and that the method of valuing inventory improperly inflated its value and did not correctly value the inventory. Moreover, the financial statement for the calendar year 1971 was false and misleading in various other respects, as the defendants then and there well knew.

(b) On or about February 6, 1973, the defendants and their co-conspirators prepared and issued a financial statement for ADLAY and its subsidiaries for the calendar year 1972. The consolidated balance sheet included as part of the financial statement falsely stated:

(i) that the liability of ADLAY and its subsidiaries with respect to "Notes Payable - Trade and Auto" was $1,501,151.98, whereas, as the defendants then and there well knew, the actual liability of ADLAY and its subsidiaries with respect to "Notes Payable - Trade and Auto" was approximately $2,900,000;

(ii) that the liability of ADLAY and its subsidiaries with respect to "Accounts Payable-Trade" was $443,841.24, whereas as the defendants then and there well knew, the actual liability of ADLAY and its subsidiaries with respect to "Accounts Payable - Trade" was approximately $1,300,000; and

(iii) that the physical inventories at various locations were taken twice yearly under the direct supervision of accountants employed by co-conspirator CHAIKIN & FIALKOW and that the inventories as shown represent the true valuation as of December 31, 1972, whereas, as the defendants then and there well knew, accountants of CHAIKIN & FIALKOW at no time in 1972 ever had occasion to supervise the taking of physical inventory and the method of valuing inventory improperly inflated its value and did not correctly value the inventory. Moreover, the financial statement for the calendar year 1972 was false and misleading in various other respects, as the defendants then and there well knew.

(c) On or about February 8, 1974, the defendants and their co-conspirators prepared and issued a financial statement for ADLAY and its subsidiaries for the calendar year 1973. The consolidated balance sheet attached to this financial statement falsely and misleadingly stated:

(i) that the earned surplus of ADLAY and its subsidiaries as of December 31, 1973 was $2,552,756.98, whereas, as the defendants then and there well knew, there was a net loss applicable of at least approximately $500,000 as of December 31, 1973;

(ii) that the net amount of the asset entitled "Leasehold Improvements, Furniture & Equipment" as of December 31, 1973 was $249,022.60, whereas, as the defendants then and there well knew, approximately $200,000 of this amount represented expenditures made by ADLAY's subsidiary, CHAREEN, in connection with extensive reconstruction and remodeling activities on SAFT's "Shingle Style", custom-built residence on Ocean Avenue, East Hampton, Long Island, which was not an asset of, and in no way benefited, ADLAY, CHAREEN or any of ADLAY's subsidiaries;

(iii) that the amount "Due From Officer," namely SAFT, was $19,339.67 as of December 31, 1973 whereas, as the defendants then and there well knew, the amount "Due From Officer," namely SAFT, was in fact approximately $248,000 as of December 31, 1973 (without taking into

account approximately $200,000 of the remodeling expenditures on SAFT's East Hampton, Long Island residence which had been misproperly charged to "Leasehold Improvements, Furniture Equipment");

(iv) that the liability of ADLAY and its subsidiaries in respect of "Notes Payable - Trade and Auto" was, as of December 31, 1973, $1,388,135.67, whereas, as the defendants then and there well knew, the actual liability of ADLAY and its subsidiaries in respect of "Notes Payable - Trade and Auto" was approximately $2,698,000;

(v) that the liability of ADLAY and its subsidiaries in respect of "Accounts Payable - Trade" was $209,538.93, whereas, as the defendants then and there well knew, the actual liability of ADLAY and its subsidiaries in respect of "Accounts Payable - Trade" was approximately $1,988,000; and

(vi) contrary to the statements in the 1973 financial statements, as the defendants then and there well knew, the accountants of CHAIKIN & FIALKOW at no time in 1973 ever had occasion to supervise the taking of physical inventory and the method of valuing inventory improperly inflated its value and did not correctly value the inventory. In addition, as the defendants then and there well knew, the 1973 financial statement was false and misleading in other respects.

(d) Between in or about December 1972, up to and including approximately May 1974, the defendants and their co-conspirators would and did make applications on behalf of ADLAY and its subsidiaries for loans from various banks and lending institutions and [illegible]s and renewals thereof, and, in connection therew[illegible] defendants and their co-conspirators would and did make and submit false financial statements for ADLAY and its subsidiaries for the year ending December 31, 1971, for the year ending December 31, 1972 and for the year ending December 31, 1973, as well as other false statements and reports.

(e) During said period of time and as a result of the submission by the defendants and their co-conspirators of the aforesaid false financial statements for ADLAY and its subsidiaries, BANK LEUMI made a loan, and opened a line of credit, to ADLAY in the approximate amount of $1,100,000 in or about March 1974 and April 1974.

(f) During said period of time and as a result of the submission by the defendants and their co-conspirators of the aforesaid false financial statements for ADLAY and its subsidiaries, (i) on April 12, 1973, EMPIRE BANK entered into a seven-year term loan agreement with ADLAY, pursuant to which EMPIRE BANK loaned ADLAY $1,200,000; and (ii) thereafter, made and granted ADLAY's requests for various changes, including revisions and waivers, and extensions, by renewal, deferment of action and otherwise.

(g) During said period of time and as a result of the submission by the defendants and their co-conspirators of the aforesaid false financial statements for ADLAY and its subsidiaries, NBNA made loans and advances, and extensions and renewals thereof, which amounted to as much as $2,100,000 in or about late November 1973 and in December 1973.

(h) During said period of time and as a result of the submission by the defendants and their co-conspirators of the false financial statements for ADLAY and its subsidiaries for the year ending December 31, 1972, and other false statements, AMERICAN BANK, in the fall of 1973 arranged to sell to ADLAY, and ADLAY arranged to purchase, approximately $350,000 worth of jewelry. In connection with the aforesaid transaction, and renewals and extensions thereof, ADLAY issued approximately $350,000 in notes in payment and as security for the aforesaid transaction.

(i) During the period of time relevant to this Indictment, the defendants and their co-conspirators prepared and issued false annual financial statements which were submitted to various banks in connection with various bank loans, advances, and extensions and renewals thereof.

IV. OVERT ACTS

13. In furtherance of said conspiracy, and to effect the objects thereof, the defendants and their co-conspirators committed the following overt acts, among others, in the Southern District of New York, and elsewhere:

(a) In or about February 1972, defendants, co-conspirators CHAIKIN & FIALKOW and Leon M. Chaikin arranged to prepare and did prepare financial statements for ADLAY and its subsidiaries for the calendar year 1971.

(b) In or about February 1973, defendants, co-conspirators CHAIKIN & FIALKOW and Leon M. Chaikin arranged to prepare and did prepare financial statements for ADLAY and its subsidiaries for the calendar year 1972.

(c) In or about February 1973, defendants SAFT and FIALKOW, and co-conspirators CHAIKIN & FIALKOW and Leon M. Chaikin transmitted and arranged to transmit ADLAY's 1972 financial statements to NBNA.

SAFT

(d) In or about the Spring of 1973, FIALKOW and Ronald Dorkin had a conversation about the remodeling of SAFT's residence in East Hampton, Long Island.

(e) In or about April 1973, SAFT arranged to submit to EMPIRE BANK, ADLAY's 1972 and 1971 financial statements and to have ADLAY enter into a term loan agreement with EMPIRE BANK which provided ADLAY with a loan of $1,200,000.

SAFT

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(f) In or about May 1973, FIALKOW caused to be retyped the financial statements for ADLAY and its subsidiaries for the calendar year 1971.

(g) In or about February 1973, defendants, and coconspirators CHAIKIN & FIALKOW and Leon M. Chaikin arranged to prepare and did prepare financial statements for ADLAY and its subsidiaries for the calendar year 1973.

(h) On or about February 12, 1974, SAFT and co-conspirator Leon M. Chaikin attended a meeting at NBNA.

(i) In or about February 1974 and March 1974, defendants and their co-conspirators arranged to submit ADLAY's 1973 financial statements to EMPIRE BANK, NBNA and BANK LEUMI.

(j) In March 1974, SAFT and co-conspirator Leon M. Chaikin attended a meeting at BANK LEUMI.

(k) In March 1974, SAFT and co-conspirator Leon M. Chaikin attended a meeting in New York, New York with representatives of Security Pacific Capital Corp. and arranged to submit to Security Pacific, ADLAY's 1973 financial statements.

(l) In April 1974, SAFT attended a meeting at the AMERICAN BANK.

(m) In April 1974, SAFT and co-conspirator Leon M. Chaikin attended a meeting with representatives of BANK LEUMI and NBNA.

V. STATUTORY ALLEGATIONS

14. It was further a part of said conspiracy that the defendants would and did make and cause to be made false financial statements and other false statements and reports which they well knew at that time would be and were submitted to various banks and banking institutions, including BANK LEUMI, EMPIRE BANK, NBNA and AMERICAN BANK for the purpose of

influencing loans and extensions of credit to ADLAY and its subsidiaries. The said false financial statements and other false statements and reports were submitted in connection with, and upon, loan applications, advances, discounts, purchases, purchase agreements, loan commitments and loans, and changes and extensions thereof, by renewal, deferment of action and otherwise, and by the acceptance, release and substitution of security therefor.

15. It was further a part of said conspiracy that the defendants, having devised and intending to devise the aforesaid scheme and artifice to defraud, would and did use and cause the United States mails to be used for the purpose of executing such scheme and artifice to defraud.

(Title 18, United States Code, Section 371)

SUBMISSION OF FALSE STATEMENTS TO BANK LEUMI

COUNT TWO

The Grand Jury further charges:

From on or about the 1st day of January, 1974, up to and including the 1st day of January 1975, HOWARD E. SAFT, NORMAN FIALKOW and EDWARD WEIZER, the defendants, unlawfully, wilfully and knowingly did make and cause to be made false statements and reports to wit, the false financial statements of ADLAY and its subsidiaries as of December 31, 1971, as of December 31, 1972, and as of December 31, 1973, for the purpose of influencing the action of the BANK LEUMI, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon a loan in the amount of one million one hundred thousand dollars ($1,100,000).

(Title 18, United States Code, Sections 1014 and 2.)

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SUBMISSION OF FALSE STATEMENTS TO EMPIRE BANK

COUNT THREE

The Grand Jury further charges:

From on or about the 1st day of January, 1973, up to and including the 1st day of January 1974, HOWARD E. SAFT, NORMAN FIALKOW and EDWARD WEIZER, the defendants, unlawfully, wilfully and knowingly did make and cause to be made false statements and re[illegible]ts to wit, the false financial statements of ADLAY and its [illegible]ubsidiaries as of December 31, 1971, and as of December 31, 1972, the purpose of influencing the action of the EMPIRE BANK, New City, New York, and Newburgh, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon a loan in the amount of one million two hundred thousand dollars ($1,200,000).

(Title 18, United States Code, Sections 1014 and 2.)

COUNT FOUR

The Grand Jury further charges:

From on or about the 1st day of January, 1974, up to and including the 1st day of January 1975, HOWARD E. SAFT, NORMAN FIALKOW and EDWARD WEIZER, the defendants, unlawfully, wilfully and knowingly did make and cause to be made false statements and reports to wit, the false financial statements of ADLAY and its subsidiaries as of December 31, 1973, for the purpose of influencing the action of the EMPIRE BANK, New City, New York, and Newburgh, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon changes in the aforesaid loan referred to in Count Three, extensions of same, by renewal, deferment of action or otherwise, or the acceptance, release or substitution of security therefor.

(Title 18, United States Code, Sections 1014 and 2.)

AS:bj
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SUBMISSION OF FALSE STATEMENTS TO
THE NATIONAL BANK OF NORTH AMERICA

COUNT FIVE

The Grand Jury further charges:

From on or about the 1st day of January, 1972, up to and including the 1st day of January, 1973, HOWARD E. SAFT, NORMAN FIALKOW and EDWARD WEIZER, the defendants, unlawfully, wilfully and knowingly did make and cause to be made false statements and reports to wit, the false financial statements of ADLAY and its subsidiaries as of December 31, 1971 for the purpose of influencing the action of the NATIONAL BANK OF NORTH AMERICA, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon a loan and extension of a loan in the amount of more than one million dollars ($1,000,000).

(Title 18, United States Code, Sections 1014 and 2.)

COUNT SIX

The Grand Jury further charges:

From on or about the 1st day of January, 1973, up to and including the 1st day of January, 1974, HOWARD E. SAFT, NORMAN FIALKOW and EDWARD WEIZER, the defendants, unlawfully, wilfully and knowingly did make and cause to be made false statements and reports to wit, the false financial statements of ADLAY and its subsidiaries as of December 31, 1972, for the purpose of influencing the action of the NATIONAL BANK OF NORTH AMERICA, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon a loan and extension of a loan in the amount of more than one million dollars ($1,000,000).

(Title 18, United States Code, Sections 1014 and 2.)

SAS:bj
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COUNT SEVEN

The Grand Jury further charges:

From on or about the 1st day of January, 1974, up to and including the 1st day of January, 1975, HOWARD E. SAFT, NORMAN FIALKOW and EDWARD WEIZER, the defendants, unlawfully, wilfully and knowingly did make and cause to be made false statements and reports to wit, the false financial statements of ADLAY and its subsidiaries as of December 31, 1973 for the purpose of influencing the action of the NATIONAL BANK OF NORTH AMERICA, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon a loan and extension of a loan in the amount of more than one million dollars ($1,000,000).

(Title 18, United States Code, Sections 1014 and 2.)

SUBMISSION OF FALSE STATEMENTS TO THE AMERICAN BANK

COUNT EIGHT

The Grand Jury further charges:

From on or about the 1st day of January, 1973, up to and including the 1st day of January, 1975, HOWARD E. SAFT, NORMAN FIALKOW and EDWARD WEIZER, the defendants, unlawfully, wilfully and knowingly did make and cause to be made false statements and reports to wit, the false financial statements of ADLAY and its subsidiaries as of December 31, 1972 and as of December 31, 1973, for the purpose of influencing the action of the AMERICAN BANK, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon an application, discount, purchase, purchase agreement, repurchase agreement, commitment and loan, and in changes and extensions thereof, in the amount of three hundred and fifty thousand dollars ($350,000).

(Title 18, United States Code, Sections 1014 and 2.)

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MAIL FRAUD

COUNTS NINE THROUGH TWENTY-ONE

The Grand Jury further charges:

1. From on or about January 1, 1972 up to and including January 1, 1975 HOWARD SAFT, NORMAN FIALKOW and EDWARD WEIZER, the defendants, devised and intended to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises.

2. The scheme and artifice to defraud and the means thereof are more fully set forth in paragraphs 1 through 15 of Count One of this Indictment.

3. On or about the dates hereinafter set forth, in the Southern District of New York, the defendants, for the purpose of executing said scheme and artifice to defraud and attempting to do so, unlawfully, wilfully and knowingly did cause matter and things to be placed in a post office and authorized depository for mail matter and sent and delivered by the postal service according to the directions thereon, as set forth below:

COUNT	APPROXIMATE DATE	ADDRESSEE	MATTER
9	April 1973	EMPIRE BANK	Financial Statement
10	August 7, 1973	NBNA	Financial Statement
11	August 7, 1973	EMPIRE BANK	Financial Statement
12	November 12, 1973	NBNA	Financial Statement
13	November 12, 1973	EMPIRE BANK	Financial Statement
14	March 7, 1974	SECURITY PACIFIC CAPITAL CORP.	Letter from Chaikin & Fialkow
15	March 1, 1974	Mr. Irving Herbst, NBNA and Mr. Stuart Weiner, Bank Leumi	Letter
16	February, 1973	NBNA (formerly Commercial Bank North America)	CHAREEN Notes
17	December, 1973	NBNA (formerly Commercial Bank North America)	CHAREEN NOTES

Sbj 580	18	April 1974	American Credit Indemnity Co. 300 St. Paul Place Baltimore, Md.	Financial Statement
	19	March 20, 1974	Paul Perlmutter 25 West 43rd St. New York, N.Y.	Letter and Financial Statement
	20	April 9, 1974	Ferex S.A. Lugano, Switzerland	Memorandum and Financial Statement
	21	April 9, 1974	Agon Watch Co., Ltd. Switzerland	Memorandum & Financial Statement

(Title 18, United States Code, Sections 1341 and 2.)

INCOME TAX EVASION

COUNT TWENTY-TWO

The Grand Jury further charges:

1. On or about the 15th day of April 1974, in the Southern District of New York, HOWARD E. SAFT, the defendant, who during the calendar year 1973 was married, unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1973, by preparing and causing to be prepared, by signing and causing to be signed, and by filing and causing to be filed with the Internal Revenue Service, an income tax return on behalf of himself and his wife, wherein it was stated that he and his wife had $33,810.23 taxable income for the year 1973 and that the amount of income tax due and owing thereon was $9,626.30, which return was false and fraudulent, as he then and there well knew, in that their taxable income for the year 1973 was in excess of $140,000, and that for year 1973 there was due and owing to the United States thereon an income tax of in excess of $90,000.

(Title 26, United States Code, Section 7201)

FALSE STATEMENTS IN GRAND JURY

COUNT TWENTY-THREE

The Grand Jury further charges:

1. On or about the 6th day of August 1975, in the Southern District of New York, NORMAN FIALKOW, the defendant, having duly taken an oath as a witness that he would testify

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truly before the April 1975 Special Grand Jury of the United States of America, duly empaneled and sworn in the United States District Court for the Southern District of New York and inquiring for that District did unlawfully, wilfully and knowingly and contrary to said oath make false material declarations.

2. At the time and place aforesaid, the Grand Jurors, inquiring as aforesaid were conducting an investigation pertaining to possible violations of United States laws prohibiting conspiracy (Title 18, United States Code, Section 371), prohibiting the making of false statements to banks in connection with bank loans and renewals thereof (Title 18, United States Code, Section 1014) and prohibiting mail fraud (Title 18, United States Code, Section 1341), among other things.

3. It was material to said inquiry to ascertain what defendant FIALKOW knew about defendant SAFT's Loans and Exchange Account with ADLAY and its subsidiaries, including the amounts thereof; what defendant FIALKOW knew about the manner in which defendant SAFT was paying for his home in East Hampton, Long Island, the amount of such payments and how these payments were being charged and recorded on the books and records of ADLAY and its subsidiaries; and all of the facts (1) with respect to SAFT's Loans and Exchange Account with ADLAY and its subsidiaries and (2) with respect to the payments on SAFT's home in East Hampton, Long Island.

4. At the time and place aforesaid, NORMAN FIALKOW, the defendant, appearing as a witness under oath before said Grand Jury did testify falsely with respect to the aforesaid material matters as follows:

Q. Did you ever have occasion, during the time that you were working as an accountant for Adlay Jewelry, in the period of time prior to June of 1974, to ever see the loans and exchanges account?

A. No, sir.

Q. Except for conversations that you are telling us that you had with Dorkin and Mr. Weiser, did you ever have any conversations with anyone else, including Mr. Chaikin, about Mr. Saft's loans and exchanges?

A. To the best of my knowledge, no.

Q. Can you tell us exactly what Mr. Dorkin and Mr. Weiser said about Mr. Saft's loans and exchanges?

A. Ah, yes. They had mentioned to me that certain items of the house he was building on the island, in the Hamptons, were being charged to the loan account.

Q. Anything else about the magnitude or other matters?

A. To the best of my knowledge, no.

(Title 18, United States Code, Section 1623)

Foreman

ROBERT B. FISKE, JR.
United States Attorney

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. 76 Cr. 414

HOWARD SAFT
NORMAN FIALKOW
EDWARD WEIZER

Defendants.

U.S. DISTRICT COURT
FILED
OCT 14 1976
S.D. OF N.Y.

Before:

HON. LAWRENCE W. PIERCE,
District Judge

New York, September 28, 1976
Room 619 - 12:00 noon

APPEARANCES

ROBERT B. FISKE, JR., Esq.,
United States Attorney for the
Southern District of New York,
By: STEVEN A. SCHATTEN, Esq.,
PETER C. SALERNO, Esq.,
Assistant United States Attorneys

DAVID L. FOX, Esq.,
Attorney for Defendant Howard Saft

- - -

REPORTERS, U.S. COURTS

(Case called.)

MR. SCHATTEN: Ready for the government.

With me is Mr. Peter Salerno of the U.S. Attorney's office.

THE COURT: Appearing for the government is Assistant United States Attorney Steven Schatten.

Appearing for the defendant is Mr. David Fox and appearing also is the defendant, Howard Saft.

What is your wish, Mr. Fox?

MR. FOX: Your Honor, at this time defendant Saft wishes to change his plea to a plea of guilty to Counts 3, 6 and 22 of the indictment insofar as Counts 3 and 6 charge Mr. Saft with having submitted false statements to the bank named in those counts --

THE COURT: Knowingly.

MR. FOX: Yes, your Honor. -- in that defendant knew that the inventory mentioned in those statements had not been supervised by Fialkow and in that the statement fails to reflect that he had received from Adlay sums in excess of the salary and loans shown in the statement.

MR. SCHATTEN: Your Honor, the only qualification I take it Mr. Fox is acknowledging that the sums were substantially in excess of that and that he further pled to Count 22 without qualification.

THE COURT: How about that?

MR FOX: I am sorry;I didn't hear that.

THE COURT: Read that back.

(Read.)

MR. FOX: As to the first portion of that question, yes, your Honor, that they were substantially in excess. With respect to the second part of Mr. Schatten's question there is one qualification and that is that the sum mentioned in the indictment in Count 23 are approximately.--

MR. SCHATTEN: 22.

MR. FOX: 22, I am sorry.

THE COURT: Approximately meaning that these are the ballpark figures.

MR. FOX: Yes, your Honor.

THE COURT: All right.

Stand, Mr. Saft.

BY THE COURT:

Q What is your full name?

A Howard E. Saft.

Q How old are you?

A 53.

Q You do read, write, speak and understand English?

A Yes, sir.

Q Now, you have received a copy of the indictment in this case in which these charges are set forth, is that correct?

A Yes.

Q You have read that indictment?

A Yes, your Honor.

Q And you read the introduction of the indictment, the first portion of it?

A Yes, your Honor.

THE COURT: The clerk will read Counts 3 and 6 and 22 to the defendant and see how he offers a plea to each of those counts.

(Clerk reads Count 3.)

THE CLERK: You understand the charge on Count 3?

THE DEFENDANT: Yes.

THE CLERK: How do you offer a plea on Count 3?

MR. FOX: With respect to the limitation that we have already set forth, your Honor, Mr. Saft is pleading to knowledge of the falsity of the 1972 statement only.

THE COURT: Is it your understanding that that is embraced within the charge enumerated in Count 3?

MR. FOX: Yes, your Honor.

THE COURT: All right, go ahead.

How do you offer to plea to that, sir?

THE DEFENDANT: I plead guilty, sir, to that.

THE COURT: All right.

Count 6.

(Clerk reads Count 6.)

THE CLERK: You understand the charge on Count 6?

THE DEFENDANT: Yes, sir, I do.

THE CLERK: How do you offer to plead to that Count 6?

THE DEFENDANT: I plead guilty.

(Clerk reads Count 22.)

THE CLERK: Do you understand the charge on Count 22?

THE DEFENDANT: Yes, sir, I do.

THE CLERK: How do you offer to plead to that Count 22?

THE DEFENDANT: I plead guilty.

THE COURT: Now, Mr. Saft, what do you normally do for a living?

THE DEFENDANT: I originated the Adlay Jewelry Corporation and previous to that I was designer representative of 13 various jewelry factories at 385 Fifth Avenue and before that I was chief executive of Cavalry

Import and Export at 251 West 40th Street.

THE COURT: Married or single?

THE DEFENDANT:Married. I am separated now, your Honor.

THE COURT: Any children?

THE DEFENDANT: Two.

THE COURT: All ages, please.

THE DEFENDANT: Jane is going to be 16 in January and Robbie will be 19 October 28th of this year.

THE COURT: What was the highest level of education you obtained?

THE DEFENDANT: I went through the Columbia, at that time, Undergraduate School of Business International.

THE COURT: Did you obtain a degree?

THE DEFENDANT: I obtained a Bachelor of Science.

THE COURT: Are you currently or recently been under the care of a psychiatrist?

THE DEFENDANT: No.

THE COURT: Have you been hospitalized or treated at any recent time for alcoholism or for narcotics addiction or any other type of drug abuse?

THE DEFENDANT: No.

THE COURT: Are you feeling well today?

THE DEFENDANT: Yes, I am, sir.

THE COURT: Have you gone over this indictment with your attorney --

THE DEFENDANT: I have, sir.

THE COURT: -- after receiving a copy of it, correct?

THE DEFENDANT: Yes, sir.

THE COURT: And he has explained to you what the charges are you are offering to plead guilty to?

THE DEFENDANT: Yes, sir.

THE COURT: And you fully understand these charges?

THE DEFENDANT: I do, your Honor.

THE COURT: And have you told your attorney everything you know about the case?

THE DEFENDANT: Yes.

THE COURT: Have you held anything back from him with reference to these charges?

THE DEFENDANT: Nothing.

THE COURT: And you understand that if you did not plead guilty to these charges you would have a right to a speedy and public trial by a jury of twelve people?

THE DEFENDANT: Yes, your Honor.

THE COURT: And that upon such a trial you would be presumed innocent unless and until the government established your guilt beyond a reasonable doubt to the satisfaction of all 12 jurors?

THE DEFENDANT: Yes.

THE COURT: And that upon such a trial you would have the right to confront and cross examine all witnesses called by the government against you?

THE DEFENDANT: Yes, sir.

THE COURT: And that upon such a trial you could remain silent and no inference could be drawn against you by reason of your silence or if you wanted to you could take the stand and testify in your own defense?

THE DEFENDANT: Yes.

THE COURT: You understand if you wanted to you could have a trial before a Judge without a jury in which the burden would be on the government and you would have the same constitutional rights?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand that you would have the right of a trial to subpoena witnesses and evidence to your own defense?

THE DEFENDANT: Yes.

THE COURT: You understand if your offer to

plead guilty to these charges is accepted, you give up these rights with respect to the charges against you and the Court can impose sentence upon you just as if a jury had brought in a verdict of guilty on each of these charges against you?

THE DEFENDANT: Yes.

THE COURT: You understand upon your plea of guilty to these charges being accepted this Court has the power to impose upon you with respect to Count 3 a term of imprisonment not exceeding two years, a fine -- withdrawn.

Let me go back again.

Do you understan with respect to Count 3 that if your plea of guilty is accepted the Court has the power to impose upon you a term of imprisonment not exceeding two years or a fine not exceeding $5,000 or both and with respect to Count 6 the Court can impose upon you a term of imprisonment not exceeding two years or a fine not exceeding $5,000 or both and with respect to Count 22 the Court can impose upon you a term of imprisonment not exceeding five years or a fine not exceeding $10,000 or both, in short, that you conceivably face a total prison term not exceeding 9 years or a total fine not exceeding $20,000 or both?

THE DEFENDANT: I understand, your Honor.

THE COURT: And further with respect to Count 22, do you understand that you may also find in both as a part of the sentence the payment of cost of prosecution?

THE DEFENDANT: I understand that.

THE COURT: What promises, if any, have been made by way of a plea agreement?

First, defendant's attorney.

MR. FOX: No promises have been made, your Honor.

THE COURT: Mr. Schatten?

MR. SCHATTEN: No promises have been made. I fact I informed Mr. Fox in connection with this plea that we would say on the record today in the event the government did go to trial on this case we would be able to prove all the charges set forth in the indicment beyond a reasonable doubt, except as listed -- as limited by the bill of particulars.

I did want to state that on the record at this time; that would include the submission of false 1972 financial statements and the fa se 1973 financial statement by Saft to all four banks mentioned in the indictment in connection with approximately 4-1/2 to $5 million in bank loans pursuant to the conspiracy.

MR. FOX: Your Honor, I would object to what is a reiteration of the bill of particulars having any consideration before the Court in view of the plea that is now being entered.

THE COURT: Objection overruled. It will probably show up in the presentence investigation report anyhow. Have you discussed with Mr. Fox the intention of the government with respect to the remaining counts upon the date of sentence?

MR. SCHATTEN: The plea being accepted by the Court and at the time of sentence the government has informed Mr. Fox that it would move to dismiss the other remaining counts that are pending against Mr. Saft and that would be done at the time of sentence.

THE COURT: Mr. Saft, have you been induced to offer to plead guilty by reason of any promise, statements or predictions by anybody in the event you will get leniency or consideration by pleading guilty instead of going to trial?

THE DEFENDANT: No.

THE COURT: Have you been induced to plead guilty by reason of any fear or threats or force or the like?

THE DEFENDANT: No, sir.

THE COURT: Are you presently under the

influence of any substance which would interfere with your ability to understand what's happening here today?

THE DEFENDANT: No.

THE COURT: Is there anything you wish to ask the Court about these charges or the consequences of pleading guilty at this time?

THE DEFENDANT: No, your Honor.

THE COURT: May we understand then that you are offering to plead guilty because you believe you are guilty of these charges?

THE DEFENDANT: Yes, sir.

THE COURT: And the government representative, Mr. Schatten, subject to going to your earlier made statement, that it has sufficient evidence to make a prima facie case as to each of these charges.

MR. SCHATTEN: The government represents we will be able to prove these charges beyond any reasonable doubt.

THE COURT: Mr. Fox, you know of no legal defense which would prevail if you went to trial and you know of no reason why defendant should not plead guilty to these charges?

MR. FOX: That is correct.

THE COURT: And you still wish to plead guilty

to these three charges?

THE DEFENDANT: Yes.

THE COURT: All right.

One final thing. You have to tell me what it is you say you did that caused you to offer the plea of guilty. Let's take Count 3 first.

Do you have a copy of the indictment there? Show it to him. First of all I'd like to know when and where and with whom did you do what that causes you to say that you are guilty of that charge set forth in Count 3?

THE DEFENDANT: I knew for many years that the inventories that were taken independently --

THE COURT: At?

THE DEFENDANT: -- in all locations.

THE COURT: Of?

THE DEFENDANT: Of Adlay and its subsidiaries and Union Chief Division and Robco Division of U.N.M., United Merchants and Manufacturers.

THE COURT: You knew what?

THE DEFENDANT: They were done independently but they were not under supervision of Chapin and Fialkow.

THE COURT: In other words, if I understand you correctly you submitted certain financial statements to a lending institution and those financial statements

indicated that the inventory at the place you mentioned had been taken under the supervision of the individuals you have mentioned, is that so?

THE DEFENDANT: That is so.

THE COURT: When in fact you knew that that was not the case and that the inventory had not been taken of those places under the supervision of those named persons?

THE DEFENDANT: Correct, sir.

THE COURT: Now did this occur from on or about the first day of January 1973 until the first day of 1974 more or less?

THE DEFENDANT: That's correct.

THE COURT: And to whom were these statements submitted with reference to Count 3?

THE DEFENDANT: To the Empire Bank.

THE COURT: Where is that located?

THE DEFENDANT: New City, New York.

THE COURT: And also in Newburgh, New York?

THE DEFENDANT: Yes, sir.

THE COURT: And for what purpose were those submitted?

THE DEFENDANT: To influence the action of the Empire Bank.

THE COURT: In doing what?

THE DEFENDANT: Lending --

THE COURT: A substantial amount of money?

THE DEFENDANT: -- a substantial amount of money.

THE COURT: Is it conceded by both sides the bank in question was a federally insured bank or loan lending institution?

MR. SCHATTEN: Yes, your Honor.

MR.FOX: Yes, your Honor.

THE COURT: All right.

Anything more with reference to that count?

MR. SCHATTEN: Yes. Mr. Saft I understood was further acknowledging the statement was further false in that it showed incorrectly that he had derived a salary of only $52,000 and borrowing of approximately $19,000 from the company whereas in truth and fact as he then and there well knew that Mr. Saft was fully aware that his salary and his borrowing was substantially in excess as set forth in the financial statement.

THE COURT: Is that correct?

THE DEFENDANT: They were in excess.

THE COURT: Now we will move to Count 6. Turn to that, please.

What is it that occurred with respect to

Count 6 that you say causes you to be guilty of the violation of federal law here? Take a look at it.

THE DEFENDANT: Yes. The same occurrence.

THE COURT: The same?

THE DEFENDANT: Yes.

THE COURT: Did these occurrences take place between the first day of January '73 up to and including the first day of January '74 more or less?

THE DEFENDANT: Yes, sir.

THE COURT: And to whom were such similar statements made with reference to this count?

THE DEFENDANT: To the National Bank of North America, New York, New York.

THE COURT: And is it conceded by both sides this is a federally insured bank or ledning institution?

MR. FOX: Defendant so concedes.

MR. SCHATTEN: The government so concedes it is a bank, deposits which were federally insured.

THE COURT: For what purpose was false financial statements knowingly made to this bank?

THE DEFENDANT: Your Honor, to influence the action of that bank in lending a sum of money to Adlay Jewelry and subsidiaries.

THE COURT: A substantial sum?

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THE DEFENDANT: Yes.

THE COURT: In excess of 100,000 in each instance?

THE DEFENDANT: Yes.

THE COURT: In each of these instances with reference to the National Bank of North America referred to in Count 6 and the Empire Bank referred to in Count 3 you knew whatyou were doing in each instance, did you not?

THE DEFENDANT: Yes, your Honor.

THE COURT: You knew it was against the law to do what you were doing in each instance, did you not?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you intended to do it at the time you did in each instance, is that not so?

THE DEFENDANT: Yes.

THE COURT: All right, let's move on.

Anything further now?

MR. SCHATTEN: I would just represent to the Court merely that the amounts of the loans are as stated in the indictment, $1.2 million in connection with the Empire Bank loan andmore than $1 million in connection with the National Bank of North America loan.

THE COURT: Were the loans actually made,

Mr. Saft, in each instance?

THE DEFENDANT: At Empire Bank although the indictment statement one million two, they had a certificate of deposit of $180,000.

THE COURT: You mean as collateral?

THE DEFENDANT: That was there as part of the one million two so they actually lent the corporation $1,020,000 and the other there was a $200,000 certificate of deposit at National Bank.

THE COURT: All right, let's move to Count 22.

First of all --well, you tell me what is it that you say you did or didn't do that caused you to plead guilty to that count?

THE DEFENDANT: Well, in essence it says that I had more taxable income than I showed on the account.

THE COURT: Well, first of all, we're talking about the calendar year 1973. Is that right?

THE DEFENDANT: Yes.

THE COURT: And is it true that during that year you were married and you filed along with your wife a joint income tax return?

THE DEFENDANT: Yes, sir.

THE COURT: And is it true that in that return for that year -- and you filed that on or around April 15th

of '74, is that correct?

THE DEFENDANT: Yes.

THE COURT: And that was in the Southern District of New York here and is it so that at that time you stated in your return that you and your wife had taxable income amounting to just under $34,000 for the year 1973 and that the amount of income tax due and owing on that amount was between 9 and $10,000, to wit, $9,626.20. Did you file a return that said that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, was that true?

THE DEFENDANT: No, your Honor.

THE COURT: And in fact the taxable income for you and your wife for the taxable year in question is said to have been in excess of $140,000. Is that true?

THE DEFENDANT: We have not been able to make a determination yet of the actual figures, your Honor.

THE COURT: Well, let's see.

I don't have to have an exact amount. I just have to know whether the amount involved was a substantial amount -- that is, substantially higher than the 33, $34,000.

THE DEFENDANT: Yes.

THE COURT: Was it at least $75,000 taxable income?

THE DEFENDANT: Yes, your Honor.

THE COURT: And did you therefore owe the United States Government in income tax at least 20 or more thousand dollars than this 9600 that you say was tax due?

THE DEFENDANT: Yes.

THE COURT: All right. I find that is a substantial amount.

MR.SCHATTEN: Your Honor, may I ask two questions or ask the Court to ask two questions; the first question being at the time that Mr. Saft filed the tax returns, did he know that those tax returns were false and fraudulent.

THE COURT: I am not finished.

MR. SCHATTEN: I apologize to the Court. The only question I put to the Court is as his lawyer stated, was he aware at the time the tax return was filed his true taxable income was approximately $140,000.

THE COURT: The Court makes a finding, first of all, that the amount of income tax due and owing for the tax year 1973 was substantial. Now tell me your purpose in filing for the lower amount rather than the higher amount? Was it an attempt on your part to evade or defeat the tax fully due, was that your primary purpose for that matter?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, did you know at the time -- withdrawn.

Did you not know at the time that the amount of the tax -- withdrawn.

Did you not know at the time thatthe amount of taxable income for the year in question for you and your wife was somewhere in the vicinity of $140,000?

THE DEFENDANT: I know, your Honor, that the taxable income was more than we reported.

THE COURT: Did you know at the time that the taxable income for the year in question for you and your wife was in excess of $75,000? We have been through this once.

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you not know at the time that the taxable income due and owing was in excess of ninety-eight twenty-six and indeed some ten to twenty or more thousand dollars in excess?

THE DEFENDANT: Yes, your Honor.

THE COURT: And did you intend to do what you did at the time?

THE DEFENDANT: Yes, sir.

THE COURT: And did you know it was a violation of the law to do what you did at the time?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

Is there anything further?

MR. SCHATTEN: Nothing from the government, your Honor.

THE COURT: All right.

The plea of not guilty heretofore interposed with respect to Counts 3, 6 and 22 is withdrawn in each instance and the plea of guilty to Counts 3, 6 and 22 is acceptable with respect to each of those counts and the clerk is directed to enter those pleas.

A presentence report is requested.

Counsel will make his client available to the Probation Department. Further, counsel and the government are authorized to read the presentence investigation report but you should do so at the probation office prior to the time set for sentence. Do not come to chambers to read the presentence report. Read it at the Probation Department. If there are any corrections or additions you can make them right there in the Probation Department at the time.

We will set this matter down for sentence on October 28th at 4:30.

MR. FOX: Your Honor, if we may, I believe

that date particularly I will not be available, but in any event, may we have an additional period of time? I request an additional three weeks to the middle of the following month for the purposes -- particularly with respect to the question that the Court will be considering at that time, I will need time to make submissions.

THE COURT: Well, we have a time limit imposed by the rule, 45 days. Is that so, Mr. Schatten?

MR. SCHATTEN: My understanding is the same as the Court's.

THE COURT: If you want to take 43 or 44 days, tha is all right with me.

MR. FOX: That would be a great help to us.

THE COURT: Now the bail question is no change?

MR. SCHATTEN: None, your Honor.

THE COURT: Same bail.

Let's pick a date. What about November 9th, 4:30, Saft for sentence, same bail? Now I have a couple of questions.

First of all, with reference to the submission under the Criminal Justice Act of an authorization to pay for expert accounting services, I have signed one or more of these already. Why should I sign a thousand dollar bill for accounting services in light of the developments today?

MR. FOX: Your Honor, the reason for that submission is the following, initially when I made an application for such services I represented to the Court that I was not authorizing more than $300 for such services. I then at approximately a month and a half ago submitted an application for additional authorization, was orally informed by your office it was approved. My accountant in fact incurred substantial periods of additional time. I do not think he has incurred the full thousand hours of time.

All I was trying to do here is cure my own negligence in not submitting that authorization when your office instructed me to.

THE COURT: All right. What I wish to do here, I am not quite sure how to handle it, so to return it -- I will give it to the clerk and the clerk will return it to you. You can correct this, probably downward, and then we will take up the question, but you are correct. It was a recitation of the sequence, and once you have corrected it I can then sign it and send it on.

MR. FOX: I will do that, your Honor.

THE COURT: Now, the next thing is -- that finishes, I believe, the Saft matter and I will ask Mr. Schatten to tell me what's going to happen with respect

to Mr. Fialkow.

MR. SCHATTEN: Your Honor, I don't know right now or I may well be in a position to get back to the Court possibly in a day or two.

I gather we have a tentative trial date of October 5th subject to the possibility we may have to October 12th.

THE COURT: The likelihood is this will go October 5th. If somewhere along the line I have to interrupt this in order to commence another trial we may be trying one portion in the morning and one portion in the afternoon -- the other case in the afternoon but this case will go everyday October 5th.

MR. SCHATTEN: I will get to the Court as soon as possible.

THE COURT: Thank you.

MR. FOX: Thank you, your Honor.

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I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Murray Deutsch

Official Court Reporter
U. S. District Court

76 Cr. 414, UNITED STATES OF AMERICA v. HOWARD E. SAFT

ENDORSEMENT ORDER

Defendant Howard Saft moves, pursuant to Rule 32(d) Fed.R.Cr.P., to withdraw his plea of guilty entered on September 28, 1976. Upon due deliberation, the Court concludes that the motion should be denied.

The attached motion was filed November 24, 1976. In his papers, defendant Saft asserted his innocence and alleged that his plea of guilty was involuntary. There was at the outset no claim that the Court had failed to comply with the requirements of new Rule 11 Fed.R.Cr.P. Rather, defendant argued that he was pressured into pleading guilty by the actions of his former counsel. On January 28, 1977, while the motion was under advisement, defendant filed a supplemental memorandum urging that his motion should be granted in light of United States v. Journet, 544 F.2d 633 (2d Cir. 1976). In opposition, the government argues that Journet is not retroactive and that the plea was voluntary.

This Court presided over the taking of Saft's plea of guilty. The transcript of that proceeding demonstrates that Saft's plea was, in the traditional sense of the word, voluntary when made. This Court, upon listening carefully to the defendant's answers during the allocution and observing his demeanor, was fully satisfied that the plea of guilty was a knowing and voluntary decision, made following consultation with counsel. Defendant Saft clearly is a well-educated and sophisticated man; he holds a degree in business administration from Columbia University School of Business; he was a member of the New York Jewelry Board of Trade; he formed his own business, Adlay Jewelry, in 1958, and saw that business grow to the point where he had many retail outlets throughout the United States. The Court has no doubt that Saft's decision to plead guilty was a difficult one; however, that does not mean that it was involuntary. This Court does not believe that a plea is rendered involuntary simply because a defendant, following a plea, changes his mind and decides that he might be better off proceeding to trial or retaining different counsel.

Although Saft now asserts that he is innocent of the charges, those allegations are in the main conclusory, particularly with respect to Count 22. He claims that his attorney pressured him into a plea; however, upon a review

of Saft's own affidavit and the affidavit of his former attorney, it is clear that contrary to his allegations, Saft did admit guilt to his former attorney in the course of their preparation for the plea allocution. The Court concludes that Saft's former counsel did not "importune" the defendant.

Saft claims that his former counsel strenuously advised him that he should take a plea to three counts instead of going to trial on twenty-two counts; that Saft might receive a longer sentence if he went to trial and was convicted on multiple counts; that it would be difficult to empanel an impartial jury, that the trial would be long, arduous and highly publicized; that the government had the testimony of at least one of his co-defendants; that the government had evidence that Saft had destroyed documents as well as evidence that demonstrated Saft's prior knowledge of the crimes involved. Finally, Saft alleges that his attorney had to rehearse him over and over again to prepare him for the plea allocution..

The Court does not find that these statements, assuming arguendo they were made, constitute misconduct or undue pressuring on the part of the former attorney. Actually, Saft seeks to discredit only two of the alleged statements--to the effect that the government had certain evidence--by reporting that his newly-retained counsel has found no such incriminating documents in the litigation file. Yet such an observation does not preclude the defendant's former lawyer from having seen the documents referred to; the inference Saft wishes the Court to draw is far too tenuous.

Indeed, even taking all the factual allegations of defendant's moving papers at face value, the Court does not conclude thereby that the plea was involuntary. The Court does not find itself persuaded that the circumstances eliminated Saft's free will or that he was unduly pressured by his attorney. Rather, Saft's own affidavit reveals that he decided to plead guilty several days before the pleading and that his attorney informed him that, in the final analysis, the decision to plead guilty was Saft's alone. Having found that Saft admitted guilt to his counsel, having taken the plea and observed the demeanor of the defendant, and having determined at that time that the plea was voluntary, the Court has read nothing in the submissions that leads it to conclude otherwise now.

Defendant makes no request for a hearing prior to decision on his motion; the government has made such a request only in the event the Court does not conclude that the papers are insufficient on their face. Since the material facts are not in dispute, and since it is clear that the motion is insufficient on its face, no hearing is necessary.

A motion to vacate a plea prior to sentence is addressed to the sound discretion of the district judge. See United States v. Lombardozzi, 436 F.2d 878, 881 (2d Cir.), cert. denied, 402 U.S. 908 (1971). After a repeated and careful review of the affidavits and the arguments of counsel, and not even considering the affidavit of the prosecutor, but basing the decision primarily on the transcript of the plea proceeding, this Court concludes that Saft's plea of guilty to the three counts in question was knowing and voluntary, and that there was a factual basis for the plea.

Finally, in his supplemental papers recently received, Saft argues that his motion should be granted in light of United States v. Journet, 544 F.2d 633 (2d Cir. 1976). The plea herein was taken on September 28, 1976, and Journet was decided on November 1, 1976; thus the Court must consider whether Journet should be given retroactive effect.

In Kloner v. United States, 535 F.2d 730 (2d Cir. 1976), the Court of Appeals repeated the oft-cited rule that a guilty plea will not be invalidated simply because the district court failed to enumerate one or more of the rights waived by the defendant in pleading guilty. See 535 F.2d at 733. Rather, Kloner ruled that in the Rule 11 inquiry, the court must look to the "totality of the circumstances". 535 F.2d at 734. That is what the Court has done herein.

Accordingly, it is apparent that the "each and every" holding of Journet constitutes a significant departure from past practice and precedent in this District and Circuit. This Court believes that the Journet decision is indeed "novel" and thus is not retroactive pursuant to the analsyis set forth in Ferguson v. United States, 513 F.2d 1011 (2d Cir. 1975). Nor is Journet retroactive under the traditional tripartite test of Halliday v. United States, 394 U.S. 831, 832 (1969). The purpose and effect of Journet has been to mandate a specific procedure for the taking of guilty pleas in the future; reliance on the "totality of the circumstances" approach was widespread, and it is abundantly clear that a retroactive application of Journet's "each and every" standard would mandate the vacating of scores of guilty pleas

entered in this court, many of which have been followed by the imposition of a prison sentence, and thus would have a substantial impact upon the administration of justice. Accordingly, under the precedent of decisions considering the retroactive application of judicial interpretation of Rule 11's requirements, the Court concludes that Journet is not retroactive to this case. Viewed in the totality of the surrounding circumstances as recited above, the Court concludes that the claimed technical deficiencies in the Rule 11 allocution did not operate to create any cognizable defects in the taking of Saft's plea. Under Kloner v. United States, the allocution was sufficient.

Accordingly, the motion to vacate the plea of guilty previously entered is hereby denied. This matter is set down for sentence on March 3, 1977 at 4:00 p.m.

SO ORDERED.

Dated: New York, New York
February 17, 1977

LAWRENCE W. PIERCE
U. S. D. J.

Copy Received, subject to inclusion of additional items in an Amended Appendix as agreed by Phillips, Nizer & the U.S. Attorney's office.

Robert B. Fiske, Jr.
US Attorney
By Steven Schlatter
AUSA
6:00 PM 4/25/77